IN THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

COUNCIL TREE COMMUNICATIONS, INC., BETHEL NATIVE CORPORATION, AND THE MINORITY MEDIA AND TELECOMMUNICATIONS COUNCIL Petitioners, v. FEDERAL COMMUNICATIONS COMMISSION and the UNITED STATES OF AMERICA, Respondents.	)	Docket No. 06-2943

EMERGENCY MOTION FOR STAY PENDING REVIEW

Council Tree Communications, Inc. ("Council Tree"), Bethel Native Corporation ("BNC"), and the Minority Media and Telecommunications Council ("MMTC") (collectively "Movants"), by their counsel and pursuant to 28 U.S.C. § 2112(a)(4), FRAP 18, and Circuit Rule 18.1, hereby move, pending judicial review, for an emergency stay of: (i) the effectiveness and enforcement of regulations adopted by Respondent Federal Communications Commission ("FCC" or "Commission") in its *Second Report and Order and Second Further Notice of Proposed Rule Making*, FCC 06-52, 71 Fed. Reg. 26245 (May 4, 2006) ("*Second R&O*"), *reconsideration granted in part and denied in part*, FCC 06-78 (June 2, 2006) ("*Reconsideration Order*"), copies of which were provided as Exhs. 1 and 2 to Movants Petition for Review filed yesterday (Docket 06-2943); and (ii)

commencement of the FCC's auction of Advanced Wireless Services ("AWS") licenses ("Auction 66"), the bidding for which is currently scheduled to begin on August 9, 2006.[1] Movants request that the stay be issued no later than June 19, 2006, the current deadline for the electronic filing of the so-called "short form" applications ("FCC Form 175") which are a prerequisite to participation in Auction 66. This Motion is compelled both by the FCC's own failure to grant the relief requested of the Court here and by the imminence of the June 19, 2006 FCC Form 175 deadline.[2] Venue in this Court is proper pursuant to Section 2343 of Title 28 of the U.S. Code. See 28 U.S.C. § 2343 and 47 U.S.C. § 402(a) -- Movant Council

---

[1] For background information on Movants and their shared commitment to bringing telecommunications services to remote and underserved areas of the United States, see the Declarations attached hereto, Appendix 1.

[2] On May 5, 2006, just ten days after release of the *Second R&O*, Movants filed a "Motion for Expedited Stay Pending Reconsideration or Judicial Review," requesting that the Commission stay both the effectiveness of the rules adopted in the *Second R&O*, and the start of Auction 66. Movants filed a "Petition for Expedited Reconsideration" concurrently with their Motion for Expedited Stay. Movants filed a "Supplement to Motion for Expedited Stay Pending Reconsideration or Judicial Review and Petition for Expedited Reconsideration" on May 17, 2006 ("Supplement"), and a "Further Supplement to Motion for Expedited Stay" on May 25, 2006 ("Further Supplement"). Movants' four pleadings are collectively referred to herein as the "Reconsideration Pleadings," and copies are attached hereto as part of Exh. B. On May 19, 2006, the FCC issued a Public Notice announcing that it was postponing the start of Auction 66 until August 9, 2006. Public Notice, "Auction of Advanced Wireless Services Licenses Rescheduled for August 9, 2006," FCC 06-71 (dated May 19, 2006) ("Auction 66 Public Notice"). Petition for Review, Exh. 3. The Commission released the *Reconsideration Order* on June 2, 2006, and allowed the rules adopted in the *Second R&O* to take effect on Monday, June 5, 2006. See Exh. A hereto for chronology.

Tree is a Delaware corporation. This Motion is properly before this Court. FRAP 18(c)(2). See also Movants' Petition for Review (jurisdiction).

This case presents issues of vital importance that demand immediate judicial intervention. After many months of advance planning by potential bidders expecting to participate in Auction 66 in reliance on FCC rules established far in advance of Auction 66, the FCC took last minute action that dramatically altered the regulatory landscape. That is, on April 25, 2006, a mere two weeks before the initial FCC Form 175 deadline for Auction 66, the *Second R&O* imposed on a key segment of the Auction 66 bidder pool draconian new restrictions that are at odds with multiple statutory directives. The FCC thereby acted contrary to the fundamental principles of fair notice, orderliness and certainty that must undergird a lawful and equitable spectrum auction. On the doorstep of Auction 66, the FCC has gone a long way toward ensuring that this auction, the largest spectrum auction in United States history and one that holds the promise of bringing high speed digital communications to even the most remote parts of this country, will be dominated by the largest of this country's incumbent wireless telecommunications carriers, to the immediate detriment of small businesses, businesses owned by members of minority groups and women, and rural telephone companies (known as "Designated Entities" or "DEs"),[3] and to the ultimate harm of the American consumer.

---

[3] Throughout this Motion, "DE" is used as a shorthand description for small

STATEMENT OF THE CASE

When Congress granted the FCC authority in 1993 to auction electromagnetic spectrum to the highest bidder, in lieu of the historic practice of awarding permits to applicants who proved at hearing that they would best serve the public interest, Congress required that the FCC take concrete, tangible steps to structure its auctions in such a way that they would not be dominated by entrenched, deep-pocketed incumbents at the expense of DEs. See 47 U.S.C. §§ 309(j)(3) and (4).[4] Although the auction statute gave the FCC a measure of discretion as to how to fulfill this mandate,[5] 47 U.S.C. §§ 309(j)(3) and (4) left no

---

businesses, businesses owned by members of minority groups and women, and rural telephone companies. *See* 47 C.F.R. § 1.2110(a).

[4] 47 U.S.C. § 309(j)(3) provides that in designing competitive bidding systems, the FCC "*shall* seek to promote" specified "objectives." Those mandated objectives include: avoidance of "administrative or judicial delays" (subsection (A)); "promoting economic opportunity and competition" by "avoiding excessive concentration of licenses" and by "disseminating licenses among a wide variety of applicants, including small businesses, rural telephone companies and businesses owned by members of minority groups and women" (subsection (B)); and allowing adequate time after "issuance of bidding rules" to ensure that potential bidders "have a sufficient time to develop business plans, assess market conditions, and evaluate the availability of equipment for the relevant services" (subsection (E)(ii)). 47 U.S.C. § 309(j)(4)(C) requires the FCC to *inter alia*, "promote (i) an equitable distribution of licenses and services among geographic areas, [and] (ii) economic opportunity for a wide variety of applicants, including small businesses, rural telephone companies, and businesses owned by members of minority groups and women...." In the Commission's own words, "[s]ince the inception of the auctions program, the Commission has sought to facilitate the participation of small businesses in the competitive bidding process." *FNPRM* at ¶ 6. *See also* 47 U.S.C. § 257 (Congress directed the Commission to identify and eliminate regulatory market entry barriers for small telecommunications businesses).

[5] 47 U.S.C. § 309(j)(4)(D) provides that FCC auction regulations "*shall ... ensure*"

doubt that the FCC has a primary obligation to promote, indeed ensure, effective participation in auctions by DEs. Over time, the FCC settled on a primary means by which to fulfill this statutory obligation – the award of bidding credits to DEs participating in auctions. In Auction 66, this has a very practical, real world consequence -- a qualified DE is entitled to subtract 15 or 25 percent (depending on the DE's size) from a gross winning bid when paying the government for a license. DEs enjoy no advantage at auction other than bidding credits.[6] The FCC has also historically been careful to preserve post-auction operational flexibility for DEs to give them a reasonable chance to succeed in the dynamic, highly competitive industries the FCC regulates.[7]

The eleventh hour changes adopted in the *Second R&O* came about in an entirely unanticipated fashion. In June 2005, more than a year in advance of Auction 66, Council Tree attempted to improve the DE program by asking the FCC to adopt limited, targeted rule changes that would make it more difficult for "large in-region incumbent wireless service providers" to extend their already

---

that DEs "are given the opportunity to participate in the provision of spectrum-based services, and, for such purposes consider the use of tax certificates, bidding preferences, and other procedures."

[6] Since 1994, the FCC has "policed" abuse of bidding credits by requiring repayment during the five years after the relevant auction of all or a graduated portion of the bidding credit (plus interest) if the DE loses its eligibility post-auction or the license is assigned or transferred to a non-DE (the "Five-Year Hold Rule").

[7] *See, e.g.*, Further Supplement at 7 n.18.

considerable influence through the use of relationships benefiting from DE bidding credits. See Exh. B1 hereto. Despite having long targeted June 2006 as the date for Auction 66, the FCC sat on Council Tree's request for nearly eight months, until prominent national publicity about alleged abuses of DE bidding credits by the principals of a large communications holding company provided an apparent spark, with the scheduled dates for Auction 66 closing in.[8] On February 3, 2006, the FCC sought comment on Council Tree's narrow proposal, tentatively endorsing the concept of restricting potential large incumbent reliance on DE bidding credits.[9] The *FNPRM* set sharply accelerated periods for comments (14 days from Federal Register publication) and reply comments (7 days thereafter).

In an abrupt, unforeseen, and, for Movants, debilitating change of course, a mere two weeks before the initial FCC Form 175 filing window was scheduled to close, the FCC took action on the *FNPRM* in the form of the *Second R&O*. Among other things, the FCC: (i) *deferred* taking any action on the issue actually targeted in the *FNPRM* – curbing the potential use of bidding credits by entrenched incumbent wireless providers; (ii) doubled the Five-Year Hold Rule for *all* DEs,

---

[8] *See* John R. Wilke, "In FCC Auctions of Airwaves, Gabelli Was Behind the Scenes," Wall Street Journal, at A1, December 27, 2005.

[9] *See* Implementation of the Commercial Spectrum Enhancement Act and Modernization of the Commission's Competitive Bidding Rules and Procedures, Further Notice of Proposed Rule Making, WT Docket No. 05-211 at ¶ 1 (2006) ("*FNPRM*").

converting it to a "Ten-Year Hold Rule;"[10] and (iii) imposed new leasing and resale restrictions on *all* DEs' use of their licenses post-auction, restrictions that effectively deprive DEs of their bidding credits if they lease or resell even so much as 25 percent of their "spectrum capacity" (the "Lease/Resale Restriction").[11] The FCC also made the new 10-Year Hold Rule retroactive, applicable to winning bidders in auctions long since concluded.

In their Reconsideration Pleadings, Council Tree and Bethel Native made clear that the *Second R&O* visited irreparable harm on them. In their own filings with the Commission, many other parties have asked the FCC to rescind the unexpected, draconian rule changes of the *Second R&O*. *See* Exh. D hereto.

On May 19, 2006, the FCC postponed by about six weeks Auction 66 and the various Auction 66 deadlines. Just before the close of business on Friday, June 2, 2006, the FCC released the *Reconsideration Order*. Among other things, in the *Reconsideration Order*, the FCC ruled that the 10-Year Hold Rule will not be applied retroactively and added some limited definitional detail as to what it meant

---

[10] See Exhibit C hereto, a chart comparing the Five and Ten Year Hold Rules.

[11] Although the *Second R&O* defined a 25 percent lease or resale of spectrum capacity to be a "material relationship" and defined a 50 percent lease or resale to be an "impermissible relationship," a "material relationship" can often be enough to nullify a bidding credit, and 25 percent is therefore the relevant lease/resale percentage for the Court's present purposes. "Spectrum capacity" was not defined in the *Second R&O*, making compliance with the new Lease/Resale Restriction an exercise in risky guesswork.

by the term "spectrum capacity," but reaffirmed that the 10-Year Hold Rule and Lease/Resale Restriction would apply to licenses awarded in Auction 66.

In separate statements to the *Reconsideration Order*, all four Commissioners who signed on to the decisions below expressed either ambivalence or regret about the changes to Auction 66 wrought on the auction's eve. In his accompanying statement, FCC Chairman Martin stated his belief that the "last-minute" changes effected by the *Second R&O* were not "needed" and then cryptically added that he agreed to them only to "obtain the support" necessary to ensure that the AWS auction would be held in Summer 2006. Commissioner Copps lamented the fact that the February 2006 *FNPRM* was not launched in Summer 2005 to allow adequate time for reaching "consensus," but that "long-scheduled" Auction 66 "cannot" be further postponed because the United States lags behind other nations in "third pipe" technology. Commissioner Adelstein worried (prophetically, Movants believe) that "legal maneuvering" in this "troubled proceeding" might "prove to be the undoing of [the FCC's] most significant auction in 10 years." Commissioner Tate expressed her sympathy for the plight of DEs who have explained to the FCC that the newly adopted 10-Year Hold Rule will shut them out of Auction 66, but resolved "that [the Commission's] efforts were to strengthen, not weaken," the DE program.

ARGUMENT

Movants satisfy the four-part stay criteria enunciated in *Virginia Petroleum Jobbers Ass'n v. FPC*, 259 F.2d 921 (D.C. Cir. 1958) and adopted by the Third Circuit:[12]

1. Has the petitioner made a strong showing that it is likely to prevail on the merits of its appeal;
2. Has the petitioner shown that without such relief it will be irreparably harmed;
3. Would the issuance of the stay substantially harm other parties interested in the proceedings; and
4. Is the issuance of the stay in the public interest.

I. MOVANTS ARE LIKELY TO PREVAIL ON THE MERITS

Movants are likely to prevail on the merits of their appeal, given the multiple violations of statutory provisions set forth below.

A. Section 309(j) of the Communications Act

The touchstone for this Court's analysis of the merits of the FCC's actions below is *Chevron, U.S.A. v. Natural Resources Defense Council Inc.*, 467 U.S. 837, 842-43 (1984).[13] Under that case, this Court looks first to the plain language of the applicable statute to determine if the challenged agency action is consistent with the clearly expressed intent of Congress.[14] Here, on the eve of Auction 66,

---

[12] *Penn Central Transportation Co.*, 457 F.2d 381, 384-385 (3d Cir. 1972); *see also Croskey Street Concerned Citizens v. Romney, 459* F.2d 109, 111-112 (3d Cir. 1972) (Aldisert J., concurring).

[13] *See also Woodall v. Fed. Bur. Of Prisons*, 432 F.3d 837, 842 (3rd Cir. 2005) (agency may not ignore statutory factors in adopting implementing rules).

[14] Under 5 U.S.C. § 706(2)(A), this Court also evaluates the Commission's actions

the FCC has contravened the plain language of multiple subsections of Section 309 of the Communications Act and the Court need look no further than that statute to find ample grounds for intervention.

Section 309(j) of the Communications Act contains multiple provisions that can be characterized as "structural steel," explicitly crafted by Congress to ensure that the FCC conduct spectrum auctions in such a way that small businesses and rural telephone companies not only participate therein, but prevail often enough to prevent an excessive concentration of licenses in the hands of entrenched, deep-pocketed incumbents. See the multiple statutory provisions cited in note 4 *supra*.[15] The language is specific and mandatory, not discretionary. Until the eve of Auction 66, the FCC had a long-established mechanism, bidding credits, in place to meet this most basic statutory obligation. Then, in one breathtaking move, the FCC's *Second R&O* changed the rules in an unanticipated, fundamental way that

---

to determine if they were arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with law. An agency must "articulate[] a satisfactory explanation for its action, including a 'rational connection between the facts found and the choice made.'" *Prometheus Radio Project v. FCC*, 373 F.3d 372, 390 (2004) (citations omitted).

[15] Remarkably, the *Reconsideration Order* fails to address the *Second R&O*'s infidelity to the FCC's *primary* statutory obligation to ensure DE participation in auctions. The *Reconsideration Order* instead "cherry picks" the issues which it apparently prefers to address. Moreover, the FCC's argument that 47 U.S.C. § 309(j)(3)(E)(ii) does not apply to the rule changes here flatly contradicts its past practices. Further Supplement at 13 n.43 (citing to the FCC's delay of the 700 MHz Auction pursuant to 309(j)(3)(E)(ii). The 700 MHz auction was delayed twice.

decimated DE participation in Auction 66, nullifying overnight DE participation plans that had been a year in the making.

By doubling from five to ten years the period during which all or a portion of the bidding credit must be repaid (with interest) in the event of a loss of DE eligibility or an assignment of a license won at auction with the help of that bidding credit, and by imposing substantial new lease and resale restrictions on the uses of spectrum by DEs post-auction, the FCC has effectively scuttled the financing available to DEs. In the painful real world case of Council Tree and Bethel Native, financing sources "headed for the exits" immediately after Commission adoption of the new Ten-Year Hold Rule. There is no scenario under which the FCC can reasonably expect financiers to invest in a new entrant with no record of performance who cannot exit the business for ten years if the business plan is not succeeding. This is particularly a problem in an industry as dynamic, fast paced and subject to change as today's wireless industry.[16] This is not mortgage financing.

---

[16] The depth of the Commission's misunderstanding of the "fatal impact" on DEs of the switch to the Ten-Year Hold Rule on the eve of Auction 66 can be seen in the treatment of this issue at paragraph 39 of the *Reconsideration Order*. There, the FCC ignores the substantial evidence before it and wanders far afield, into an unrelated FCC docket involving instructional television stations, to find "evidence" that commenters there urged the FCC to adopt very lengthy "lease" horizons, more than thirty years in fact, to better incentivize investment in noncommercial educational television stations. But this "comparison" could not be more false or more irrelevant. Investors will always want as much "certainty" about core assets (*e.g.*, a long-term lease) as they can get. But they will simultaneously want as much flexibility and fluidity as possible with respect to their investment (*e.g.*, a

In the same way, the imposition of new "material relationship" standards that severely limit the lease and resale (including wholesaling) of spectrum by small business auction winners who utilize bidding credits sharply reduces the business plan flexibility which is vital to surviving in the intensely competitive wireless industry against entrenched incumbents. By replacing flexibility with rigidity, the FCC has again negated the statute and driven away funding sources. As a consequence, the Auction 66 field has been left to the entrenched incumbents who face no similar limitations – precisely contrary to the result intended by Congress.[17]

---

reasonable exit window). Proof is found in the investment guidelines utilized by the Telecommunications Development Fund ("TDF"), an organization created by Congress to help finance small telecommunications business start-ups. 47 U.S.C. § 714. Indeed, FCC Chairman Martin appoints the Directors, and sits on the Board, of the TDF, and is certainly familiar with the basic investment principles it follows. The TDF will not even look at a potential investment which requires that TDF lock up its investment for ten years. See Exh. C, note 1 (3-6 years is long-term investment horizon).

[17] The *Reconsideration Order* does nothing to repair the damage of the *Second R&O* on this point but rather, exacerbates it. The FCC's decision to offer up a "safe harbor" definition of "spectrum capacity" based on MHz population counts, and then invite its regulatees to experiment with other spectrum capacity definitions, subject to later FCC review, can work as a trap for the unwary. A DE business plan predicated on an alternative spectrum capacity definition has the unsettling potential to implode as soon as the FCC disagrees with the alternative definition. Likewise, a DE that believes its lease or resale agreement is entitled to grandfathered status as a "done deal" under paragraph 29 of the *Reconsideration Order* may find otherwise, if the relevant agreement grants the DE discretion to retain and use as much of the leased or resold spectrum as the DE sees fit. In such a deal, the "lessee" may find that its expectation about spectrum is hardly "done." Ironically, a lease provision that *promotes* DE control could be the undoing of the DE's grandfathered status.

Even if this Court for any reason finds that *Chevron* deference is due the FCC's implementation of the auction statute in the *Second R&O*, Movants would still prevail on the merits. The harsh impact of the *Second R&O* on the planned participation of legitimate DEs in Auction 66 so undermines the primary objectives embedded in 47 U.S.C. § 309(j) that this Court cannot let the *Second R&O* stand. As this Court found in *Woodall*, regulations are impermissible if they do not "harmonize[ ] with the plain language of the statute, its origin and purpose."[18]

The Commission will no doubt try to persuade this Court that the Ten-Year Hold Rule and the Lease/Resale Restriction are no more than standard FCC exercises in finding the proper "balance," in this case the balance between promoting DEs and preventing the "unjust enrichment" that comes from abuse of the DE program. But, the *Second R&O*'s changes have thrown the DE program completely "out" of balance. Indeed, if the 10-Year Hold Rule and Lease/Resale Restriction are not rescinded, there will be *no* risk that Council Tree, Bethel Native, and DEs like them will be unjustly enriched by Auction 66, because they will not be able to participate in Auction 66.

B. The Administrative Procedure Act

Congress has built additional "structural steel" into the administrative agency rulemaking process in the form of the Administrative Procedure Act

---

[18] 432 F.3d 235, 249 (3rd Cir. 2005), *quoting Zheng v. Gonzales*, 422 F3d 98, 119 (3d Cir. 2005).

("APA"). Under the APA, an agency must provide public notice of any proposed rule, "either the terms or substance of the proposed rule or a description of the subjects and issues involved." 5 U.S.C. §553(b).[19]

In this case, the FCC released the *FNPRM* tentatively approving and soliciting comment on *limited*, *targeted* rule changes and then unfairly used that rule making vehicle to adopt an entirely new and unproposed set of changes, universally applicable to all DEs. The stark absence of comments from prospective DEs, current DE licensees, and investors *prior* to the release of the final rules and the thundering chorus of objections from those same interested parties to the new rules is a compelling indicator of the inadequacy of the FCC's public notice in this proceeding.[20] The FCC failed to provide adequate notice in several material aspects. First, the *FNPRM* sought comment on the FCC's central "tentative

---

[19] *American Iron and Steel Institute v. EPA*, 568 F.2d 284, 291 (3rd Cir. 1977). These "[n]otice requirements are designed (1) to ensure that agency regulations are tested via exposure to diverse public comment, (2) to ensure fairness to affected parties, and (3) to give affected parties an opportunity to develop evidence in the record to support their objections to the rule and thereby enhance the quality of judicial review." *International Union, United Mine Workers of America v. Mine Safety and Health Administration*, 407 F.3d 1250, 1259 (D.C. Cir. 2005) (citing *Small Refiner Lead Phase-Down Task Force v. EPA*, 705 F.2d 506, 547 (D.C. Cir. 1983). While an agency may promulgate final rules that differ from the proposed rule, *Shell Oil Co. v.* EPA, 950 F.2d 741, 750 (D.C. Cir. 1991), a final rule is a "logical outgrowth" of a proposed rule only if interested parties "should have filed their comments on the subject during the notice-and-comment period." *United Mine* Workers, 407 F.3d at 1258 (quoting *Northeast Md. Waste Disposal Auth. V.* EPA, 358 F.3d 936, 952 (D.C. Cir. 2004)) (internal quotation marks omitted).

[20] *See, e.g.,* Exparte Comments National Telecommunications Cooperative Association, trade association for rural telephone carriers. Exh. D16.

conclusion" that DEs' material relationships with "large in-region incumbent wireless service providers" should result in restricted DE benefits.[21] The Commission also sought comment on whether a relationship a DE has with an "entity with significant interests in communications services" should also be considered "material."[22] These two issues formed the core of the FNPRM and were highlighted throughout the *FNPRM*. Agency action is not valid where, as here, the *FNPRM* "contains, nothing, not the merest hint," that the agency was considering changes of the character ultimately adopted in the final rule.[23] And, in no way could it be said that the new rules adopted in the *Second R&O* were "tested via exposure to diverse public comment."[24]

The *Reconsideration Order* appears designed to convince a reviewing Court that the seeds of the *Second R&O* were indeed sown in the *FNPRM*. The *Reconsideration Order* cites to phrases and sentences of the *FNPRM* in isolation, out of context "pursuant to any eligibility restriction we might adopt." But the *FNPRM* solicited comment on a specific, targeted refinement that the FCC

---

[21] *FNPRM* at 1.

[22] *See e.g.*, *FNPRM* at 10-11, 14.

[23] *Kooritzky v. Reich*, 17 F.3d 1509, 1503 (D.C. Cir. 1994).

[24] The *Second R&O* did not give a rational underpinning for the new 25/50 percent Lease/Resale Restriction or explain how that new restriction was compatible with the FCC's previous standard, which provided that "leasing by a designated entity licensee of '*substantially all* of the spectrum capacity of the licensee' would cause attribution likely leading to a loss of eligibility." *Second R&O* at ¶ 24. These failures are the very definition of "arbitrary and capricious" under *Greater Boston*

tentatively endorsed in the *FNPRM*: limiting the use of DE bidding credits by large in-region incumbents. The *FNPRM* in no way heralded a comprehensive review of the fundamental rules affecting all DEs that could lead to new rules that would crash down on all DEs on the threshold of Auction 66.[25]

Ultimately, this Court must conclude that the *Second R&O* is not the "logical outgrowth" of the *FNPRM*. Council Tree and Bethel Native would need the powers of the Oracle of Delphi to anticipate that a proceeding Council Tree itself had recommended to address the discrete problem of large, deep-pocketed incumbents' potential abuse of bidding credits would first earn the FCC's tentative endorsement (in the *FNPRM*) but then, in a startling, phantom reversal, result in the demise of their own ability to participate in Auction 66, to the very direct and tangible *benefit* of the same large incumbents who were the ostensible targets of the *FNPRM*.

C. The Regulatory Flexibility Act.

The Commission's *Second Report and Order* also violates the Regulatory Flexibility Act, as amended by the Small Business Regulatory Enforcement

---

Corp. v. FCC, 463 F.2d 268 (D.C. Cir. 1971).

[25] In fact, by making still more substantive changes in the "rules of the road" for Auction 66, the *Reconsideration Order* merely compounds the confusion and adds to the chaos that has made Auction 66 impossible for many DEs to plan for, and makes a mockery of the FCC's statutory obligation to issue bidding rules with sufficient time to allow bidders to, *inter alia*, "develop business plans." 47 U.S.C. § 309(j)(3)(E)(ii).

Fairness Act of 1996 ("RFA"). 5 U.S.C. §§ 601 *et seq.*[26]

Here, the FCC prepared the Final Regulatory Flexibility Analysis ("FRFA") without procedural or substantive compliance with the requirements of the RFA because the IRFA was incomplete and the final rules were radically different from the proposed rules. See Supplement at 10-11, Exh. B12. *Southern Offshore Fishing Ass'n v. Daley,* 995 F.Supp., 1411, 1436 (M.D. Fl. 1998). DEs did not have the benefit of commenting on the FCC's discussion of the significant economic impact of, *inter alia* the new Ten-Year Hold Rule and the Lease/Resale Restriction. Moreover, the FRFA was required to include an explanation of why the FCC rejected alternatives proposed by commenters. The FCC failed to meet this statutory requirement.[27] See Supplement at 4-7, Exh. B12.

II. IF NOT STAYED, THE *SECOND R&O* WILL CAUSE IRREPARABLE INJURY TO COUNCIL TREE, BETHEL NATIVE, AND OTHER DEs.

As Section I *supra* and the record below amply demonstrate, DEs will suffer irreparable injury if the Commission's new rules are not stayed. See Exhs. B and D hereto. For example, prior to the *Second R&O*, Council Tree developed a

---

[26] Violations of the RFA are judicially reviewable, U.S.C. § 611, and may subject a final rule to stay, remand, or vacature. *See. e.g., United States Telecom Ass'n v. FCC,* 400 F.3d 29, 42 (D.C. Cir. 2005) (remanding the Intermodel Order to the FCC for failure to comply with the RFA).

[27] The FCC was also required to include a "summary of the significant issues *raised by the public comments* in response to the [IFRA], a summary of the assessment of the agency of such issues, and a statement of any changes made in the proposed rule as a result of such comments." 5 U.S.C. § 604(a)(2) (emphasis added).

business plan to provide new wireless, voice, data and broadband service to underserved, rural and low-income customers in partnership with Bethel Native, an Alaskan Native Village Corporation that is 100-percent minority owned. Council Tree had negotiated detailed term sheets with other experienced and qualified investors, and was in the process of drafting final agreements with those investors for financing participation in the AWS Auction. However, as explained above, these investors beat a hasty retreat upon release of the *Second R&O* and announcement of the 10-Year Hold Rule and the Lease/Resale Restriction. Unless the new rules are rescinded and the status quo ante reliably restored, those funding sources are not coming back, and Council Tree faces being forced out of business.[28]

III. OTHER INTERESTED PARTIES WOULD NOT BE SUBSTANTIALLY HARMED IF A STAY WERE GRANTED.

In contrast to the irreparable harm that DEs face, other interested parties would not be substantially harmed if a stay of the new rules were granted. The rules are so radically different from the established DE rules, and the scope of their impact so unexpected, that no party could reasonably assert that it relied upon them in organizing its business relationships and obtaining financing. Though some

---

[28] The irreparable nature of the injury derives from several factors. First, there is no "replacement opportunity" for the AWS auction, given the incomparable array of spectrum licenses at stake. Second, there is no avenue for redress for the economic harm caused to Council Tree and others because there is no basis for which a claim for monetary damages can be filed against the FCC. Third, unwinding the AWS auction once it has occurred would be a prolonged, complex,

parties might prefer to obtain AWS licenses sooner rather than later, they will suffer no harm if the status quo is maintained. And, in fact, all parties would ultimately benefit from the reestablishment of a regulatory environment in which fundamental rule changes are fully tested through public comment and carefully considered before they are adopted.

IV. GRANTING A STAY IS IN THE PUBLIC INTEREST.

Finally, the public interest strongly weighs in favor of a stay due to the important statutory and public interest considerations that would be vindicated. One of the most important current telecommunications policy goals is the achievement of full broadband deployment to underserved areas, including rural areas, tribal lands, and insular and high cost areas. *See* 47 U.S.C. §254(b)(3).

It is imperative that this Court stay Auction 66. Such a heavily flawed auction must not be allowed to proceed in its current chaotic state. Quite tellingly, the four FCC Commissioners themselves provided solid reasons to stop this auction dead in its tracks, vacate the *Second R&O*, and allow for a reasonable time for DEs to try to stitch back together their funding sources and auction participation plans. The *Second R&O*'s changes: (i) are unnecessary (Chairman Martin); (ii) were improvidently rushed but now simply "cannot" be delayed (Commissioner Copps); (iii) are nothing more than risky "legal maneuvering" in a "troubled proceeding" (Commissioner Adelstein); and (iv) elicit "sympathy" for

---

expensive and uncertain process.

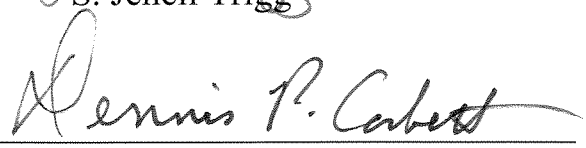
the plight of DEs whose Auction 66 plans have been dashed (Commissioner Tate). If the Commissioners responsible for these decisions can offer nothing more in their defense, this Court must summarily direct them to halt Auction 66 until they get it right. If the Court fails to do so, the only winners will be the large incumbent wireless providers who suddenly find themselves positioned for a prime spectrum windfall.

V. CONCLUSION

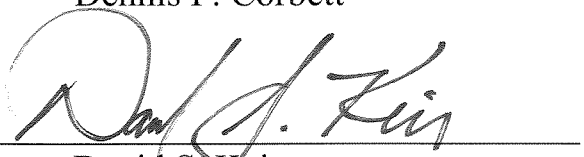
For the foregoing reasons, the Court should stay both the commencement of Auction 66 and the effective date of the FCC's rules adopted in the *Second Report and Order* pending agency reconsideration or judicial review.

Respectfully submitted,

S. Jenell Trigg*



Dennis P. Corbett



David S. Keir
Leventhal Senter & Lerman PLLC
2000 K Street, NW Suite 600
Washington, DC 20006-1809

* *Lead Counsel*

June 7, 2006

Its Attorneys